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CHARLES ELMORE

In the Supreme Court of the United States

OCTOBER TERM, 1931.

No. 158.

AMOS SHRIVER,

Appellant,

vs.

WOODBINE SAVINGS BANK OF WOODBINE, IOWA,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF IOWA.

BRIEF FOR THE APPELLEE, WOODBINE SAVINGS BANK OF WOODBINE, IOWA.

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COCKLE PRINTING CO., LAW BRIEFS, OMAHA

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APPEAL FROM THE SUPREME COURT OF THE STATE OF IOWA.

BRIEF FOR THE APPELLEE, WOODBINE SAVINGS BANK OF WOODBINE, IOWA.

The appellant's statement of the facts of this case is fair and sets forth the matters necessary for a correct understanding of the questions involved in this appeal.

SUMMARY OF APPELLEE'S ARGUMENT.

I.

Section 9248-a1 of the Code of Iowa of 1927 (Chapter 181, 41st G. A. of Iowa) imposes no new nor additional liability on the appellant as a stockholder in the appellee

bank for the payment of an assessment against him to restore impaired capital, and it does not impair the obligation of appellant's contract, for the reasons:

1. Sections 9246-7-8 of the 1927 Code of Iowa which have been, since the latest reincorporation of appellee bank, a part of appellant's contract, are the statutes which imposed a personal liability on appellant for the payment of assessments against him to restore impaired capital.

2. Section 9248-al of the 1927 Code of Iowa, does not impose a liability on appellant which did not exist before its enactment, but provides only a remedy for the enforcement of a liability which already existed.

II.

The construction placed upon Sections 9246, 9247, 9248, 9248-al of the 1927 Code of Iowa by the Supreme Court of Iowa in this case, has become a part of the statutes, and will be accepted by this Court as binding upon it.

III.

Had Sections 9246-7-8 and 9248-al been construed to impose a new, additional and greater liability upon the appellant, Section 9248-al would still be constitutional as not impairing the obligations of appellant's contract, for the reason:

1. That long prior to the time when appellant acquired his stock in appellee bank, the reserve statute of Iowa was enacted (Iowa Code of 1873, Sec. 1090; Iowa Code 1927, Sec. 8376; Appendix page 19).

IV.

Section 9248-a1 of the Code of Iowa is not unconstitutional as violating the due process clause of the constitution.

ARGUMENT.

I.

The statute in question (Sec. 9248-a1 of the 1927 Code of Iowa) does not impose a new and additional liability on appellant.

The personal liability of the appellant as a stockholder in the appellee bank for the payment of an assessment to restore impaired capital was imposed in 1894 by the 25th General Assembly of Iowa, Chapter 29, (Appendix page 17) and that law is now embodied in Sections 9246-7-8 of the 1927 Code of Iowa. The law found in these sections of the Iowa Code has always been a part of appellant's contract as a stockholder in the appellee bank.

The Supreme Court of Iowa has determined in this case (R. 56, 57, 58, 59, 60, 61, 62, 63 and 64) that Secs. 9246—47-48 of the 1927 Code of Iowa (25th G. A. of Iowa, Chap. 29), impose a personal liability on the stockholders of state and savings banks for the payment of assessments made thereunder to restore impaired capital. This is the first time in Iowa that these statutes have been construed as to this point. The cases of *Leach v. Arthur Savings Bank,* 203 Iowa 1052, 213 N. W. 772, and *Andrew v. Peoples State Bank of Humbolt,* 234 N. W. (Iowa) 542, 546, did not directly involve the question, and what

is said in these cases on the proposition is dicta. These cases just mentioned involved only the question of the right of a stockholder to offset the amount paid by him on an assessment to restore impaired capital against his statutory liability due from him after the insolvency and closing of the bank provided for in Sec. 9251 of the 1927 Code of Iowa. But whatever view may be taken of the language of these cases, the direct holding in this case to the contrary on this matter is controlling, this being the later decision.

The construction of the Supreme Court of Iowa placed on Secs. 9246-47-48 of the 1927 Code of Iowa in this case, is the correct construction and is sound logically. The statutes show clearly by their language that the legislature intended to and did impose on stockholders of state and savings banks a personal liability for the payment of assessments to restore impaired capital. Throughout these statutes reference is made to the liability of the *stockholder* for the assessment; the reference is not made to the stock. These statutes are set out in the Appendix hereto at page 19-20 with the word "stockholder" italicized by ourselves for the purpose of making clear what we are here contending.

There are also other reasons which make it clear that such was the intention of the legislature: The title of the original act embodying this law (25th. G. A. of Iowa, Chap. 29, Appendix page 17 which we have set out for the purpose of showing the title) is as follows: "AN ACT to provide for the better security of depositors in State and savings banks under the laws of

Iowa." If no personal liability was intended to be imposed on the stockholder, the law would utterly fail of its purpose "to better secure depositors" in every case like the present one wherein the stock could not be sold for any appreciable amount and wherein the sale of the stock completely failed to repair the stock. It is clear that the statute is intended to cause to be made good any impairment of the stock. The statute mentions the *deficiency*. If only the stock were liable and the intention of the law was to look no farther than the amount received from the sale of the stock, there would really never be any deficiency.

2. The Woodbine Savings Bank was reorganized and reincorporated by the stockholders in the year 1911, and it was during the bank's corporate existence under this re-incorporation that the assessment in this case was made. The provisions of Secs. 9246-47-48 of the 1927 Code of Iowa have at all times constituted a part of appellant's contract as a stockholder in appellee bank; the appellant agreed to be liable for and to pay an assessment to repair his stock; he agreed to abide by the law then in force to better secure depositors in the bank by keeping his stock unimpaired.

With these provisions of the statute a part of appellant's contract, the obligations thereof could not be impaired by Sec. 9248-a1 of the 1927 Code of Iowa which provides for the collection of an amount necessary to make whole the stock he held under that contract. This statute merely provides a remedy for the enforcement of the personal liability which was originally created by the

25th. G. A. of Iowa, Chapter 29. Prior to the enactment of Sec. 9248-al, the remedy for the enforcement of this liability *up to the value of the stock,* was by the sale of the stock; the *statute* provided no remedy for the collection of a deficiency that might exist after the sale of the stock; this remedy, we suggest, was left to equity which, according to its old maxim, never suffers a right or liability to be without a remedy for its enforcement.

Contrary to the statement of appellant's counsel (Appellant's Brief Page 11) that "In the present case the Iowa Court says there was always a personal liability resting on the stockholder to pay an assessment to restore impaired capital, but there was no way of enforcing it", the Supreme Court of Iowa expressly refrained from deciding the point as to whether there was no way of enforcing the payment of the assessment, in this language (R. 64):

> "Conceding, without deciding, that under the original statute, the remedy was limited to the confiscation of the stock, yet that remedy, such as it was, arose for the purpose of enforcing a personal liability against the stockholder."

It is plain, as we have argued above, that the intention of the legislature in Secs. 9246-47-48 was to provide law to compel the stockholder to keep his stock unimpaired "for the better security of depositors in state and savings banks", and the construction now placed upon these statutes by the Supreme Court of Iowa which is now a part of the statutes makes this intention clear. This intention of the legislature, which is the controling factor, precludes the thought that the

sale of stock was an exclusive remedy for the enforcement of the personal liability.

Under the well-established principle that a shareholder in a corporation has no vested right in a particular remedy by which his liability as such may be enforced against him and that the remedy may be changed without impairment of the stockholder's contractual rights, Sec. 9248-a1 of the 1927 Code of Iowa is not violative of the constitution.

Waggoner vs. Flack, 188 U. S. 595;

Henley vs. Myers, 215 U. S. 373.

II.

The construction of a state statute by the highest tribunal of the state will be accepted as binding on the federal courts.

It is a familiar rule supported by numerous authorities, that this Court will adhere to, follow and be bound by the construction placed upon a state statute by the highest judicial tribunal of that state. The construction becomes a part of the statute and binds the federal courts as the text of the statute itself.

Munday vs. Wisconsin Trust Co., 252 U. S. 499.

This is true although this Court, if it were exercising its own independent judgment, would give the opposite or a different construction to the statute.

St. Louis etc. R. Co. v. Quinette, 251 Fed. 773.

To the end of giving weight to the construction placed upon a state statute by a state court in the de-

termination as to whether the state statute violates the federal constitution, this Court will accept the construction of the state court as correct.

New York v. Sohmer, 237 U. S. 276.

The decisions of state courts construing statutes of that state are entitled to great respect, especially where, as in this case, that construction agrees with the very evident intention of the legislature in enacting the statute, and that construction is in conformity with justice.

Jones v. Portland, 245 U. S. 217.

The strongest reason why this Court should accept the interpretation of these Iowa statutes by the Supreme Court of Iowa, is that the interpretation is logically sound, as we have argued in DIVISION I hereof. When this construction by the Iowa Court has been accepted as correct, it must follow that the statutes as applied to this case, are not repugnant to the constitution.

III.

Section 8376 of the 1927 Code of Iowa reserves in the legislature the power to enact the law contained in Sec. 9248-a1.

Section 9248-a1 would still be constitutional as not impairing the obligations of appellant's contract, though it were determined that the statute imposed a new and additional liability upon the appellant.

1. It is well understood that the laws in force at the time the stockholder in a corporation acquires his stock is a part of the stockholder's contract wtih the state,

with the corporation, and with the other stockholders. Long prior to the time when appellant took his stock in the Woodbine Savings Bank and at all times since, there was and has been what is known as a reserve statute in force in the State of Iowa. This statute first appeared in the Iowa Code of 1873, Sec. 1090, and and is now Sec. 8376 of the 1927 Code of Iowa. (Appendix page 19). This statute has always been a part of appellant's contract. It provides that the state may alter, amend, repeal or set aside by law the articles of incorporation, by-laws, rules and regulations of corporations, and every franchise obtained, used or enjoyed by a corporation is subject to regulation by the Legislature or may be withheld or made subject to conditions imposed upon the enjoyment of such franchise, whenever the General Assembly shall deem it necessary for the public good.

This reserve statute empowers the legislature to impose liabilities and burdens upon stockholders in corporations where none existed before.

> "Where the State has reserved the power to alter, repeal, or amend the charter, it may authorize the corporation to levy assessments on its stockholders, in addition to the subscription for their stock. The reason of this rule is clear. A limited liability is a part of the corporate privileges conferred. The right to repeal the franchise includes the right to repeal in part or altogether the franchise or privileges of limited liability."
>
> *Cook on Corporations,* 5th Ed. Vol. I, Sec. 242, p. 521.

"Under this reserve power, however, the Legislature it is held, may impose a statutory liability upon stockholders after they have incorporated and

gone into business under a charter which does not impose such liability. The exercise of this power by the Legislature, in such a case, is held to be only a repeal of part of the corporate franchises."

Cook on Corporations, 5th Ed. Vol. II, Sec. 501.

"A power reserved to the Legislature to alter, amend, or repeal a charter, authorizes it to make any alteration or amendment of a charter granted subject to it which will not defeat or substantially impair the objects of the grant, or any right vested under it and which the Legislature may deem necessary to secure either that object or any public right."

N. Y. & New Eng. R. R. vs. Bristol, 155 U. S. 556.

Under such reserve power the Legislature may make non-assessable stock assessable, make the stockholders personally liable for the debts of the corporation, and otherwise increase the burdens of the stockholders.

Sherman vs. Smith, 1 Black (U. S.) 587; 17 Law Ed. 163;

Hinckley v. Schwartschils, et al., 95 N. Y. S. 357; 107 App. Div. 470;

Looker v. Maryland, 179 U. S. 46; 45 Law Ed. 79;

Citizens Nat. Bk. v. Kentucky, 217 U. S. 443;

Barth v. Pock, 51 Mont. 418; 155 Pac. 282;

Williams v. Nall, 108 Ky. 21; 55 S. W. 706;

Gardner v. Hope Ins. Co., 9 R. I. 194; 11 Am. St. Rep. 238.

This is particularly true of banks because of their very close relations with the fiscal affairs of the people and the revenues of the state.

"The nature of a corporation is, therefore, an important consideration in determining the extent of the reserved right of the state to alter or amend its charter. In some corporations the public is interested, and in others it is not; and the right of interfering in their management varies accordingly."

Morawetz on Corporations, (2nd. Ed.) Vol. 2, page 1098.

It is the province of the state to regulate, restrain and govern the business of banking and safeguard the public as depositors.

Goodsill v. Woodmanse, 46 N. W. (N. Dak.) 970.

The assessment in the case of *Gardner vs. Hope Ins. Co.,* 9 R. I. 194; 11 Am. St. Rep. 238, was for the purpose of repairing capital. It was contended that since the stockholder owned his stock fully paid up prior to the passage of the act which provided for the assessment, that such act was unconstitutional as to him and that he could not be subjected to additional burdens without his consent. That case is not so strong in its facts as the case at bar, in favor of the assessment, but the court there held:

"The legislature have reserved the power, at any time to alter or repeal the charter, or any of its provisions. The corporations accepted it upon this condition, and agreed that its provisions might be changed, and every purchaser of stock in this company has assented to these terms, and has agreed to hold his shares subject to this liability to change."

The contention of the appellant here seems to be that the statute (9248-a1) is unconstitutional because the assessment is not for the purpose of paying the debts of

the corporation; that if it were for the payment of debts, it would be constitutional because it would then be a repeal of the corporate franchise of limited liability. However, there are other franchises granted by the state, such as the franchise of corporate existence and perpetual succession, and there is also a franchise of limited liability for the furnishing of security to depositors. If appellant had been conducting a private bank or was a member of an unincorporated association doing a banking business, his entire individual property would have been the security to depositors, whereas in the Woodbine Savings Bank, a corporation, he is compelled to pay only an assessment of 100% on his stock for the "better security of depositors".

Indeed, is not the assessment to restore impaired capital for the purpose of paying indirectly, if not directly, the debts of the corporation? Such assessment is in theory and in fact for the purpose of paying the debts of the bank. The payment is not direct to the depositors and creditors, but it goes directly to take out worthless paper and to make up losses incurred by the bank in handling funds of depositors while the stockholder was a member of the organization. The funds raised by the assessment are placed in the bank to enable the bank to pay the depositors whenever they call for their money.

Aside from any consideration of franchises, under the reserve statute the Legislature has the power to make any reasonable regulations for the protection of the depositors and creditors of the bank which is for the public

good. Contrary to the appellant's contention and the dissenting opinion in the Supreme Court of Iowa in this case, Sec. 9248-a1 is meant to affect only the contract between the stockholder and the state, and not the contract between the stockholder and the corporation or the one between the stockholders themselves. The statute seeks to regulate the relation between the stockholder and the public. The assessment provided for in the statute is not for the purpose of making money for the corporation or for enriching any person who might purchase stock put up for sale; it is for the purpose of providing better security for depositors, who are the general public. The purchaser of the stock of a delinquent stockholder at a sale under the statute might or might not profit by the transaction. When the stockholder allows the stock sold, he does so because he thinks there is no profit in it, else he would pay the assessment himself and keep the stock and reap a profit; the stockholder is given his day and when he allows the sale of his stock, he does it to disassociate himself from the corporation. Any profit accruing to his successor is an incidental matter; it is a matter in which the state and the law are not concerned.

The regulation of the business of banking is a proper exercise of the State's police power, and Code Sec. 9248-a1 is a provision enabling the exercise of that power. The purpose of the statute is to enable the State to compel the performance of one of the terms of the stockholder's agreement, to-wit: the agreement to keep his stock unimpaired and to provide at all times the necessary security for depositors and creditors of the bank. If the position of the minority of the Iowa Supreme Court is

correct wherein they say (R. 77): "We do not think that it is within the legislative function to confer such power upon any agency; nor indeed do we think that the Legislature itself could exercise such a power," it would be impossible ever to enforce the collection of an asessment to restore impaired capital and a statute for the purpose would be useless.

IV.

Section 9248-al of the 1927 Code of Iowa does not take appellant's property with due process of law.

It is not unreasonable and unjust that a stockholder should be compelled to make good any impairment of the capital stock of a bank held by him. According to the construction given to the statutes involved herein, it was the stockholder's agreement when he took his stock to be personally liable for such assessment. The assessment is no more unjust than the assessment or statutory liability for the payment of credtiors after the insolvency and closing of the bank. If the bank were insolvent and closed, the stockholder would be liable for an assessment of 100%. The assessment to restore impaired capital—in case the stockholder allows his stock to be sold as in this case—is appropriately made the ultimate liability of the stockholder. When his stock is sold, the stockholder is out; to him the bank is the same as closed. Both the assessment to restore impaired capital and the statutory liability in case of insolvency are limited in amount to 100%; the statutory liability is limited to this amount by statute (Sec. 9251 of the 1927 Code of Iowa, Appendix, page 21), and the assessment to restore impaired capital is limited to 100% because the stock could never be im-

paired more than 100%. Nothing can be impaired more than 100%. Because they are both the ultimate liability of the stockholder and because they are both limited to the same amount, it is our contention that the one is the fair equivalent of the other.

It is asked, "Why should it be deemed the duty of appellant to make this stock worth One Hundred Dollars ($100.00) per share in the hands of the person who purchased it for One Dollar ($1.00) per share?" The answer is: Because appellant's agreement has always been since he acquired the stock, to keep it unimpaired "for the better security of depositors" and the fact that this may inure to the benefit of the purchaser of the stock is incidental and immaterial.

The legislation under consideration does not in reality take the property of appellant and give it to another person; it places the property in a fund for the security of depositors. This is the theory and effect of all legislation enacted for the purpose of restoring impaired capital and it is not violative of the due process clause of the constitution.

CONCLUSION.

Section 9248-a1 of the 1927 Code of Iowa is not unconstitutional for the following reasons: FIRST, it provides only a permissible change in the remedy for the enforcement of a liability for an assessment to restore impaired capital. SECOND, if it had imposed a new and additional liability on the stockholder, the legislature

was authorized to impose that liability because of the reserve statute, Sec. 8376 of the 1927 Code of Iowa.

The statute is not unreasonable and unjust and does not violate the due process clause of the constitution.

The construction placed upon the statutes, Secs. 9246-47-48-48al of the 1927 Code of Iowa by the Supreme Court of Iowa, is correct, and under the rules this construction will be binding upon this Court.

Respectfully submitted,

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APPENDIX.

Chapter 29, Acts of the Twenty-fifth General Assembly of Iowa.

AN ACT to provide for the better security of depositors in State and savings banks organized under the laws of Iowa.

Be it enacted by the General Assembly of the State of Iowa:

SECTION 1. That should the capital stock of any state or savings bank organized under the laws of this state be now, or hereafter become impaired by losses or otherwise, the board of directors of such state or savings bank may by consent of the Auditor of State, within thirty (30) days after passage of this act or after such impairment shall come to their knowledge, cause the deficiency to be made good by assessment upon the shareholders pro rata for the amount of stock held by them. Notice of such assessment to be given in writing signed by the president or vice-president and attested by the cashier or secretary of the association with the corporate seal thereof. The deposit of said notice in the postoffice directed to the shareholders at their last known address shall be sufficient for the purpose of this act.

SEC. 2. Should any of the shareholders in any state or savings bank organized under the laws of this state neglect or refuse to pay their pro rata of an assessment made under provisions of section 1 of this act within ninety days from the date of notice thereof, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock held by such shareholder or

shareholders to be sold at public auction (after thirty days' notice shall have been given by posting such notice of sale in the office of the bank and by publishing such notice in a newspaper of the city or town in which the bank is located, or in a newspaper published nearest thereto) to make good the deficiency, and the balance, if any, shall be returned to such delinquent shareholder or shareholders.

SEC. 3. Should the board of directors of any state or savings bank organized under the laws of this state, the capital of which now is, or hereafter may become impaired, neglect or refuse to proceed as provided in section 1 of this act, they shall by reason of such neglect or refusal, for a period of ten days after being requested in writing by the owner of two-thirds of the stock of such bank by and with the consent of the auditor of state, become individually liable for the amount of such deficiency and said liability may be enforced at law by any creditor of or stockholder in the association; or in case of its subsequent insolvency, by the receiver thereof.

SEC. 4. This act shall be in force and effect from and after its publication in the Iowa State Register and Des Moines Leader, newspapers published in the city of Des Moines, Iowa.

Approved April 24th, 1894.

I hereby certify that the foregoing act was published in the Iowa State Register May 5 and in the Des Moines Leader May 4, 1894.

W. M. McFARLAND,
Secretary of State.

Code of Iowa, 1873.

Sec. 1090. The articles of incorporation, by-laws, rules and regulations of corporations hereafter organized under the provisions of this title, or whose organization may be adopted or amended hereunder, shall, at all times, be subject to legislative control, and may be, at any time, altered, abridged, or set aside by law, and every franchise obtained, used, or enjoyed by such corporation, may be regulated, withheld, or be subject to conditions imposed upon the enjoyment thereof, whenever the general assembly shall deem necessary for the public good.

Code of Iowa, 1927.

8376. LEGISLATIVE CONTROL. The articles of incorporation, by-laws, rules and regulations of corporations hereafter organized under the provisions of this ttle, or whose organzation may be adopted or amended hereunder, shall at all times be subject to legislative control, and may be at any time altered, abridged or set aside by law, and every franchise obtained, used or enjoyed by such corporation may be regulated, withheld, or be subject to conditions imposed upon the enjoyment thereof, whenever the general assembly shall deem necessary for the public good. (C., '73, Sec. 1090; C., '97, Sec. 1619; C., '24, Sec. 8376).

Code of Iowa, 1927.

9246. IMPAIRMENT OF CAPITAL STOCK—ASSESSMENTS. Should the capital stock of any state or savings bank become inpaired by losses or otherwise, the superintendent of banking may require *an assessment upon the stockholders,* and shall address an order to the

several members of the board of directors of such bank, fixing the amount of assessment required. (C., '97, Sec. 1878; C., '24, Sec. 9246.)

9247. COMPLIANCE WITH ORDER. The board of directors shall, within thirty days after the receipt of such order, cause such deficiency to be made good by a ratable *assessment upon the stockholders* for the amount of stock held by them, by giving such *stockholders* notice in writing, signed by the president or vice president, attested by the cashier or secretary of the bank, under its seal, if it have one, and deposited in the postoffice, addressed to the last known residence of the *stockholders*, proof thereof to be made by the affidavit of the person so making the deposit, which notice shall state the entire sum to be raised, and the amount due from the addressed *stockholder*. (C., '97, Sec. 1878; C., '24, Sec. 9247.)

9248. ASSESSMENT ENFORCED. Should any *stockholder* neglect or refuse to pay his assessment within ninety days from the date of mailing notice thereof, the board of directors shall cause a sufficient amount of the capital stock held by such *stockholder* to be sold at public auction to make good the deficiency, after giving ten days' notice thereof by personal service or by posting the same in the bank, and publishing it in some newspaper of the county in which the bank is located, which notice shall recite the assessment made, *the amount due thereunder from the stockholder*, and the time and place of sale; proof of all which may be made in the manner provided in the preceding section. (C., '97, Sec. 1879; C., '24, Sec. 9248; 41 G. A. Chap. 181, Sec. 1.)

Code of Iowa, 1927.

9251. LIABILITY OF STOCKHOLDERS. All stockholders of savings and state banks shall be individually liable to the creditors of such corporation of which they are stockholders over and above the amount of stock by them held therein and any amount paid thereon, to an amount equal to their respective shares, for all its liabilities accruing while they remained such stockholders. (C., '97, Sec. 1882; C., '24, Sec. 9251.)